

Campbell-Harris Electric, Inc. and Campbell Electric, Inc. and Local Union 700, International Brotherhood of Electrical Workers, AFL-CIO.
Case 26-CA-8136

September 17, 1983

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On November 7, 1980, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, Respondents Campbell-Harris Electric, Inc. and Campbell Electric, Inc. (herein also called Respondent Campbell-Harris and Respondent Campbell), filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order,² as modified herein.

In their exceptions, the Respondents contend that the Administrative Law Judge erred (1) in failing to find that employee B. L. Harris, also known as Budgie Harris, is the son of L. W. Harris, stockholder and officer of Respondent Campbell-Harris; (2) in concluding that Respondent Campbell-Harris violated Section 8(a)(3) and (1) by terminating B. L. Harris in order to avoid its obligations under the collective-bargaining agreement; and (3) in finding that Respondent Campbell Electric violated Section 8(a)(3) and (1) by failing to hire B. L. Harris. In support of their exceptions, the Respondents argue that Section 2(3) of the Act excludes from the definition of "employee" "any individual em-

ployed by his parent or spouse," and, therefore, since B. L. Harris is the son of L. W. and Elizabeth Harris (who together owned 50 percent of the stock of Respondent Campbell-Harris), the Respondents could not have violated the Act by discharging and failing to hire B. L. Harris. We find merit in the Respondents' exceptions.

The record indicates that B. L. Harris is the son of Campbell-Harris owners L. W. and Elizabeth Harris. The Board has long held that a child of a shareholder having a 50-percent or more ownership interest in a closely held corporation will be excluded under Section 2(3) of the Act from the status of "employee" as an "individual employed by his parent or spouse." In such corporation the Board will pierce the corporate veil and treat such shareholder as the actual employer of the employee. See, generally, *Cerni Motor Sales, Inc.*, 201 NLRB 918 (1973), and *Foam Rubber City #2 of Florida, Inc., d/b/a Scandia*, 167 NLRB 623 (1967).³ Therefore, B. L. Harris was not protected by the Act when he was discharged by Respondent Campbell-Harris.

The impediment to B. L. Harris' employee status may have been removed when his parents no longer had an ownership interest in Respondent Campbell-Harris.⁴ At that time, however, Harris had been discharged, and Respondent Campbell had no obligation to offer him reinstatement as he had not lost employment as an "employee" as the result of a violation of the Act or as the result of a labor dispute.⁵ Once the impediment to his employee status was removed, Respondent Campbell only had an obligation to accord him the rights of an employee applicant had he sought employment.

While the record contains no evidence that B. L. Harris was ever offered a job by Respondent Campbell as were employees McKee and Maples,⁶ there is no evidence that Harris ever sought employment with Respondent Campbell. Therefore, in view of Harris' lack of employee status, Respondent Campbell was under no obligation to offer him employment. Accordingly, we find that Harris' dis-

¹ The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We herein correct an inadvertent error of the Administrative Law Judge. With respect to a conversation between Tom Campbell, an owner and officer of both Respondent Campbell-Harris and Respondent Campbell, and Rodney Green, business agent of the Union, the Administrative Law Judge incorrectly stated in his Decision that Tom Campbell had decided to dissolve Respondent Campbell, rather than Respondent Campbell-Harris. This inadvertent error does not affect the conclusions reached herein.

² In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

³ In *Cerni Motor Sales* and in *Foam Rubber City* the Board interpreted Sec. 2(3) to resolve a unit placement issue, but the interpretation is applicable to a question of employee status whether it arises in a representation or a complaint case. Any other conclusion constitutes a suspension of that section of the Act from matters arising under Sec. 8 of the Act, and amounts to an unsanctioned, as well as unwarranted, alteration of the statute the Board is empowered to administer.

⁴ The dissent misconceives our decision when he asserts that we find that Harris' exclusion from coverage of the Act continued after his parents relinquished their ownership in Respondent Campbell-Harris.

⁵ Cf. *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), and *The Laidlaw Corporation*, 171 NLRB 1366 (1968), which are relied upon by the dissent.

⁶ We adopt the Administrative Law Judge's finding that McKee and Maples were constructively discharged when they were offered employment by Respondent Campbell on an open-shop basis.

charge by Respondent Campbell-Harris was not violative of the Act and that Respondent Campbell's failure to hire Harris was likewise not violative of the Act. Contrary to our dissenting colleague, we deem this result to be required by the plain language of the statute.⁷

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Campbell-Harris Electric, Inc. and Campbell Electric, Inc., Fayetteville, Arkansas, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Coy McKee and Frank Maples immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled 'The Remedy.'"

2. Substitute the attached notice for that of the Administrative Law Judge.⁸

MEMBER JENKINS, dissenting in part:

Respondent Campbell-Harris Electric, Inc., hereinafter Campbell-Harris, violated the Act when it discharged employee B. L. Harris; and Respondent Campbell Electric, Inc., hereinafter Campbell, violated the Act when it failed to hire B. L. Harris following the alleged dissolution of Campbell-Harris. My colleagues assert that B. L. Harris was

⁷ Contrary to the dissent, we do not hold that an employer in a family-held corporation has a "legitimate interest under law in discriminating against" a child-employee who engages in protected concerted activity. Our holding simply represents recognition of the statutory constraint imposed by Sec. 2(3) of the Act upon the Board's exercise of its mandate to protect the rights guaranteed employees by Sec. 7 of the Act.

Also without merit is the dissent's attempt to equate Harris as a nonemployee to a supervisor within the meaning of the Act, and his application to Harris' discharge by Campbell-Harris of the so-called integral part test, a test used by the Board before *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), to find the discharge of a supervisor unlawful where the discharges occurred along with that of employees whose discharges were discriminatorily motivated. In *Parker-Robb* the Board abandoned the integral part test and found that a supervisor was not protected by the Act by virtue of his participation in union activities. Thus, even assuming, *arguendo*, that the dissent's equation of Harris' situation to that of a supervisor is apt, Harris' discharge for union activities would not be unlawful.

⁸ We are of the opinion that the policies of the Act will best be effectuated if the notice which Respondents are required to sign and post includes an introductory paragraph explaining to employees their rights under the National Labor Relations Act, and by what process their rights have been upheld.

not an "employee" within the meaning of Section 2(3) of the Act because his parents, L. W. and Elizabeth Harris, owned 50 percent of the outstanding stock of Campbell-Harris at the time of the discharge. They do not disagree that Harris was discriminated against because of his union activity, but they find such discrimination was not unlawful. I consider that the Act does not permit an employee such as B. L. Harris to be discriminated against because of his union activity, especially when the pattern of misconduct directly involves other individuals who are clearly employees within the meaning of the Act.

The majority, citing *Cerni Motor Sales, Inc.*, 201 NLRB 918 (1973), and *Foam Rubber City #2 of Florida, Inc., d/b/a Scandia*, 167 NLRB 623 (1967), finds that because B. L. Harris' parents had a 50-percent ownership interest in Campbell-Harris, B. L. Harris was thereby excluded for all purposes from protection under the Act. Therefore, my colleagues conclude, Campbell-Harris was free to discriminatorily discharge Harris in an effort to avoid its obligations under the collective-bargaining contract with the Union. Further, and equally perplexing to me, the majority finds that Harris' exclusion from coverage under the Act continued after his parents relinquished their ownership in Campbell-Harris and Campbell was formed. Thus, the majority finds no violation as a result of Campbell's failure to hire Harris. I disagree.

The majority's findings are predicated upon Board policies applicable in the representation case area where a determination must be made as to whether the children of the employer's owner-managers share a community of interest with bargaining unit employees. My colleagues' reliance on *Cerni Motor Sales* and *Foam Rubber City* as authority for the stripping of B. L. Harris of his rights under the Act demonstrates an overly mechanical approach and an unwillingness to examine closely the ramifications of their conclusion. In *Cerni Motor Sales*, the Board determined that certain children of the employer's president/part owner should be excluded from the bargaining unit. The Board observed that a corporation equally owned by two shareholders is much like a copartnership and, under Section 2(3), the children of copartners are excluded from the status of "employee[s]." Thus, by creating and imposing the legal fiction that the children were employed by their parents, rather than the corporation, the Board excluded the children from the bargaining unit. The Board also noted in *Cerni Motor Sales*, *supra* at 918, that, even if "Section 2(3) is not susceptible to the foregoing interpretation," the children would be excluded from the unit based on community-of-inter-

est standards because the children were more closely allied with management than with their fellow coworkers.⁹ By now concluding that because children of shareholders are excluded from bargaining units it necessarily follows that such children are absolutely excluded from coverage under the Act, the majority has unnecessarily deprived a substantial number of employees of their rights under the Act.

If this were a representation case involving unit composition issues, I would not hesitate to rule that B. L. Harris shares an insufficient community of interest with the other unit employees and would therefore exclude him from the bargaining unit. In so finding, I would employ the legal fiction devised in the cases cited above, and conclude that Harris is not an employee within the meaning of the Act for purposes of determining whether he should be included in the bargaining unit.

However, this is not a representation case, but rather involves very serious unfair labor practices centered on the Respondents' attempt to dissipate completely the bargaining unit. For this reason, I do not believe that the same rationale for excluding Harris from the bargaining unit can soundly be applied to deny Harris protection against discrimination because of his union activity. In a representation case, we read Section 2(3) expansively to exclude the child of a parent-shareholder from the bargaining unit in order to protect a union's legitimate interest in having a unit free of individuals who are most likely closely allied with management. The majority, in depriving B. L. Harris of protection under the Act, implies that an employer which is owned in part by the parent of a child-employee has some legitimate interest under the law in discriminating against the employee for engaging in union or protected concerted activity. I can perceive no such legitimate employer interest. In an unfair labor practice case the policy considerations are different, because the reasons for excluding the child of the parent-shareholder are negated by the discrimination. The Act is not served by refusing to protect the legitimate union activities of the child of a parent-shareholder. What could be more coercive to employees generally than the sight of the son or daughter of a majority shareholder being unlawfully terminated or disciplined in some other way for engaging in legitimate union activity? In the circumstances herein, I would not interpret the statutory language as the Board does in representation cases, but, rather, I would conclude that B. L. Harris was an employee of Camp-

bell-Harris and Campbell, and was and is entitled to all of the benefits and protections afforded employees under the Act.

Assuming, *arguendo*, that Harris was technically not an "employee" under Section 2(3) at the time of his discharge from Campbell-Harris, I would find that Campbell violated the Act by failing to offer him reinstatement because any statutory disability of Harris due to his being the son of corporate shareholders was lifted after the dissolution of Campbell-Harris.

The majority finds and I agree that Campbell-Harris and Campbell are *alter egos*. However, the fact that one company is the *alter ego* of another does not necessarily mean that the two companies are identical in all respects. Many factors were considered in finding that Campbell is an *alter ego* of Campbell-Harris, with the factor of "ownership structure" playing a minor role in the determination because the ownership of Respondent enterprise had changed with B. L. Harris' parents relinquishing their ownership interest in Campbell-Harris. Assuming that Harris was not an "employee" before the dissolution of Campbell-Harris, there is no legally supportable reason to find that he continues to be a nonemployee even after his parents divested themselves of their ownership interest. The Act is undermined by holding that the alleged statutory disability to employee status remains even after the reason for the existence of the disability has been removed.

It is no answer to say, as the majority does, that, because the record contains no evidence that Harris actively sought employment with Campbell after being discharged by Campbell-Harris, Campbell is thereby free from liability for failing to hire him. Under the principles set forth in *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), and *The Laidlaw Corporation*, 171 NLRB 1366 (1968), after Harris' parents relinquished their ownership interest, the Respondent enterprise cannot lawfully treat Harris as if he had never been employed by Campbell-Harris. Section 2(3) provides that the term "employee" shall include an employee whose work has ceased as a consequence of any unfair labor practice. Under *Fleetwood Trailer* and *Laidlaw*, absent a showing of legitimate and substantial business justification, Campbell violated the Act by failing to offer Harris reinstatement following his discharge by Campbell-Harris. Harris' "basic right" to a job far outweighs any possible legitimate economic justification Campbell may have had for failing to offer reinstatement and disregarding Harris' rights under the above-cited cases. The inevitable effect of Campbell's refusal to hire Harris is to penalize him for being a union member. Further,

⁹ See also *Foam Rubber City*, *supra* at 624, for a similar discussion of the rationale supporting the exclusion of the son of a corporate shareholder from a bargaining unit.

Campbell's unlawful action is inherently destructive of employee rights and contrary to the basic tenets of the Act. By requiring Harris to seek employment with Campbell, rather than requiring Campbell to offer Harris reinstatement, the majority has placed an unwarranted burden on Harris.

I am well aware of the Board's recent decision in *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), in which the Board rejected the "integral part" test in cases involving the alleged unlawful discharge of a supervisor, and, as set forth in detail in my concurrence in *Parker-Robb*, I believe the Board's decision is wrong. As in *Parker-Robb*, I do not agree that Campbell-Harris was free to discharge Harris with impunity merely because of his "nonemployee" status. In so finding, the majority, as in *Parker-Robb*, misconceives the philosophical underpinning of the cases involving the discharge of a supervisory employee where the discharge is an integral part of an employer's plan to discourage union activity. In those cases, the Board finds the supervisory discharge to be violative in order to protect the *employees* from the unlawful actions designed to coerce them in the exercise of their Section 7 rights. Similarly, the discharge of B. L. Harris herein was an integral part of Respondents coercive plan to rid themselves completely of the Union, their employees who are union members, and their obligations under the collective-bargaining agreement. Accordingly, it is clear that complete restoration of the *status quo ante*, including the reinstatement of Harris, is necessary to dissipate fully the coercive effects of Respondents' unlawful conduct.

I would therefore adopt the Administrative Law Judge's findings that Harris was unlawfully discharged and order Respondents to offer Harris reinstatement and make him whole.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge employees in order to avoid our obligations under the contract with Local 700, International Brotherhood of Electrical Workers, AFL-CIO.

WE WILL NOT discharge employees because they refuse to accept wages less than those required by the contract with the above-named Union.

WE WILL NOT refuse to recognize and bargain with the above-named Union as the representative of our employees in the appropriate unit. The appropriate unit is:

All employees employed by employer-members of the Fort Smith Division, Arkansas Chapter, National Electrical Contractors Association, Inc., performing electrical work within the territorial jurisdiction of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights protected by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Coy McKee and Frank Maples full, immediate, and unconditional reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of pay they may have suffered as a result of their unlawful discharge, with interest.

WE WILL reimburse the Union for any losses due to our failure to honor union dues-deduction authorizations of unit employees.

WE WILL make whole all employees in the appropriate unit for any wage and benefit losses they may have suffered from our failure to apply the terms of the collective-bargaining agreement between us and the Union, with interest.

WE WILL make whole our unit employees by transmitting the contributions owed to the Union's health and welfare, pension, industry, and apprenticeship funds pursuant to the terms of our collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions. This shall include

reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, pension, industry, and apprenticeship funds after we unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of our required contributions to such funds; and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered.

WE WILL pay to our employees appropriate interest on such moneys.

WE WILL, upon request, bargain with the above-named Union, in the appropriate unit described above, concerning rates of pay, wages, hours of work, and conditions of employment of our employees and, if an understanding is reached, embody such understanding in a signed agreement.

CAMPBELL-HARRIS ELECTRIC, INC.
AND CAMPBELL ELECTRIC, INC.

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge: This proceeding involves allegations that Campbell Electric, Inc. (herein called Respondent Campbell), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), and that Campbell-Harris Electric, Inc. (herein called Respondent Campbell-Harris), violated Section 8(a)(1) and (5) of the Act. The proceeding is based on a charge filed by the above-named Union on November 5, 1979,¹ which charge was amended on December 13. Pursuant thereto, complaint issued on January 4, 1980, which complaint was amended on January 22, 1980. On May 8, 1980, hearing was held in Fayetteville, Arkansas.

Upon the entire record,² including my observation of the witnesses, and after consideration of the briefs of the parties, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

From 1967 to June 30, 1979, Respondent Campbell-Harris, an Arkansas corporation, was engaged in the business of electrical contracting with its principal office and place of business at 2301 S. School Street, Fayetteville, Arkansas. During the 12-month period preceding June 30, 1979, Respondent Campbell-Harris purchased

and received goods directly from outside the State of Arkansas valued in excess of \$50,000.

Respondent Campbell is an Arkansas corporation which began operations as an electrical contractor on May 1, 1979, at the same location as Respondent Campbell-Harris. Since it began operations, and as of the date of hearing, Respondent Campbell had purchased and received goods directly from outside the State of Arkansas valued in excess of \$50,000.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Refusal To Bargain

1. The facts

Respondent Campbell-Harris was originally a partnership of Tom Campbell and L. W. Harris. In 1967, it became a corporation in which Campbell owned 49 shares, Harris owned 49 shares, and their respective wives owned 1 share each. Campbell was president and Harris secretary-treasurer.

In 1968, Respondent Campbell-Harris signed its first contract with the Union. In 1973, it authorized the Fort Smith Division, Arkansas Chapter, National Electrical Contractors Association, Inc., herein called NECA, to act as its representative for purposes of collective bargaining with the Union and was thereafter party to contracts with the Union, the most recent of which was effective from September 1, 1978, to August 31, 1980.

Campbell testified that, in April 1979, he and Harris decided to go out of business because they had not been successful in obtaining work. Pursuant to that decision, steps were taken to dissolve the corporation and Respondent Campbell-Harris ceased operations on or about June 30.

Contemporaneously, Campbell decided to form his own business and, on May 2, articles of incorporation for Campbell Electric, Inc., were filed with Campbell, his wife, and his son as the sole stockholders, and with its principal office and place of business at the same location as Respondent Campbell-Harris.

On June 29, as part of the dissolution of Respondent Campbell-Harris, Respondent Campbell-Harris and Respondent Campbell entered into an agreement whereby Respondent Campbell undertook to complete all of Respondent Campbell-Harris' unfinished projects. Any profits from such projects were to be split between Campbell and Harris.

Dissolution of Respondent Campbell-Harris required a distribution of assets and these were distributed more or less evenly to Campbell and Harris. Thus, personal property valued at \$6,009 was transferred to Harris and personal property valued at \$5,046 to Campbell. Personal property valued at \$4,825 was sold and the proceeds were distributed evenly to Campbell and Harris. Certain personal property was distributed to Campbell and Harris jointly, as was the real property on which the office was located. According to Campbell, the real property was distributed to him and Harris and their respective wives, jointly, because Respondent Campbell-Harris was unable to find a buyer. Accounts receivable

¹ Unless otherwise indicated, all dates hereinafter are in 1979.

² The General Counsel's unopposed motion to correct the official transcript is hereby granted.

were disbursed equally as received over a period of 4 or 5 months.

When Respondent Campbell-Harris ceased operations, it had in its employ one secretary and four construction workers, K. Campbell (Tom Campbell's son), journeyman B. L. Harris, and journeymen-foremen H. C. Harris and C. McKee. When Respondent Campbell began operations it employed the same secretary, H. C. Harris and R. Campbell, as electricians, one B. Campbell as a helper, and one Mark Harris (son of H. C. Harris) as an apprentice.

Respondent Campbell actually began doing electrical work on or after July 1 and it operated as an open shop. Campbell testified that about May 8, he told Rodney Greer, business agent of the Union, that Respondent Campbell had decided to go out of business. Greer asked him what he was going to do and Campbell told him he planned to start another business with his son.

About May 28, Campbell had another conversation with Greer who asked him to withhold any decision about Respondent Campbell going open shop or being a union shop while Greer tried to obtain some relief for union contractors for a lower wage rate and better work rules. Campbell told him he could not wait, that whatever decision he made he would make on the last day of business, and that as of then he had not made a decision. On Monday of the last week Respondent Campbell-Harris was in business, Greer asked about Campbell's decision and Campbell told him to see him Friday, that he had not yet made a decision.³ On Friday, Campbell told Greer that he could not see how he could be successful signing a union contract.

As noted earlier, Respondent Campbell occupies the same premises formerly occupied by Respondent Campbell-Harris. The occupancy is pursuant to a rental agreement whereby Respondent Campbell pays Campbell *et ux.* and Harris *et ux.* a monthly rental of \$416. The property has another building on it and it is occupied by Harris at a monthly rental of \$315. These rents are paid into a joint account to satisfy obligations on the property; e.g., mortgage and insurance.

As noted earlier Respondent Campbell agreed to complete work in progress of Respondent Campbell-Harris. This consisted of four jobs. When Respondent Campbell commenced doing electrical work it commenced with those four jobs and the job Campbell had bid in May on behalf of Respondent Campbell. Since its inception, Respondent Campbell has been doing essentially the same work Respondent Campbell-Harris did and a substantial portion of its business is with companies for whom Campbell-Harris had done electrical work; e.g., Heckathorn Construction Company, Kan-Ark, Cargill, and Campbell Soup Company.

³ I cannot credit Campbell's assertion that he did not make his decision whether to abide by the contract or go open shop until Friday. In May, Campbell had submitted a bid for a job on behalf of Respondent Campbell. The record does not contain any details of the bid, but it is difficult to understand how Campbell could make a bid in May for work to be performed by Respondent Campbell when, if he were credited, he did not even know what his labor costs would be.

2. Analysis and conclusions

The complaint alleges that Respondent Campbell-Harris and Respondent Campbell are *alter egos* and a single employer within the meaning of the Act. Alternatively, the complaint alleges that Respondent Campbell is a successor to Respondent Campbell-Harris. Inasmuch as Respondent Campbell has refused to abide by the terms of the contract to which Respondent Campbell-Harris was a party, the complaint alleges that Respondent Campbell violated Section 8(a)(1) and (5) of the Act.

The Board has held that *alter ego* status is conferred where two enterprises have substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership.⁴ In the instant case, it is abundantly clear that Respondent Campbell has the same business purpose that Respondent Campbell-Harris had, and that it is engaged in that business, including the obligation to complete unfinished contracts of Respondent Campbell-Harris, from the same location, with some of the same equipment, and some of the same customers. The only question therefore is whether the management and ownership of Respondent Campbell is substantially identical with that of Respondent Campbell-Harris to warrant a finding that Respondent Campbell is an *alter ego*.

It is evident that Respondent Campbell-Harris, albeit a corporation in form, was, in effect, a partnership of Tom Campbell and L. W. Harris. It is also evident that Respondent Campbell, albeit a corporation in form, is, in effect, a sole proprietorship. In my judgment, there is a substantial difference between a partnership and an individual proprietorship, and, at first thought, it appeared to me that a finding of substantial identity of ownership was not warranted. In *John Fender Electric Company and its alter ego or joint employer Fender-Mason Electric Company*, 244 NLRB 957 (1979), cited by Respondent, the situation was converse. What had been, in effect, a sole proprietorship (viewing owners Fender and his wife as one) had been succeeded by what was, in effect, a partnership of Fender and one Mason, and the Administrative Law Judge had deemed such ownership to be radically different and such as to preclude a finding of *alter ego*. Arguably, if one owner becoming two precludes a substantial identity of ownership, two owners becoming one should warrant the same result. In my judgment, such is not necessarily the case.

Despite the result in *John Fender Electric Company*, identical corporate ownership is not the *sine qua non* of *alter ego* status. The Board made this clear in *Crawford Door Sales Company*, *supra*. And, in *John Fender*, in affirming the Administrative Law Judge's conclusion that Fender-Mason was not an *alter ego*, the Board relied not only on the difference in ownership, but also on the markedly divergent labor relations and operational structures of the two companies. Such is not the case here.

It is clear that Campbell was the manager of the business of Respondent Campbell-Harris, just as he is man-

⁴ *J. M. Tanaka Construction, Inc., et al.*, 249 NLRB 238 (1980); *Crawford Door Sales Company, Inc., and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976).

ager of Respondent Campbell. In both companies, it was he who prepared the bids on which the success of the firm depends and he who laid out the work. It was he who was in charge of labor relations for Respondent Campbell-Harris. Thus, he signed the letter of assent authorizing NECA to act as Respondent Campbell-Harris' collective-bargaining representative and he participated in the Harris' collective-bargaining negotiations with the Union. After the decision to dissolve Respondent Campbell-Harris, it was he alone who met with union representatives, and, as late as March 1980 with Respondent Campbell fully operational, it was Campbell on behalf of Respondent Campbell-Harris who notified the Union of its withdrawal from NECA and submitted modifications and changes to be contained in any future agreement between Respondent Campbell-Harris and the Union. It is readily seen from these facts that here, unlike *John Fender*, labor relations are still determined by Tom Campbell and operational structures are unchanged.⁵

According to Campbell, operational structures did change in that, at Respondent Campbell-Harris, Harris was supervisor of the jobs and Harris handled financial matters whereas Campbell now handles both functions. His testimony on this point, however, was somewhat general, and, as to Harris' role in the supervision of the field operations, it was, in effect, contradicted by the testimony of journeymen Frank Maples and Coy McKee that it was Campbell who assigned them to their jobs and that they dealt with Harris only occasionally. I credit Maples and McKee. In my judgment, they had insufficient awareness of the legal significance of this fact to testify falsely in the matter. It is noteworthy that Harris himself did not testify. It is also noteworthy that Campbell and Harris were part owners of Northwest Systems, Inc., located at the same location as Respondents and that Harris was involved in the operation of that company at least to the extent of laying out electrical work handled by that company. During the period of the events herein, Campbell divested himself of his interest in Northwest Systems, Inc., and Harris has continued his management of the company which pays rent to Campbell and Harris, as individuals.

As to Harris' role in financial matters, it is not too clear what it consisted of beyond handling accounts receivable and apparently arranging for materials and supplies. That Campbell would now handle such functions does not appear to reflect a significant change in operational structure.

In short, it appears to me, and I find, that there is a substantial identity of ownership and management between Respondent Campbell-Harris and Respondent Campbell, and given the presence of the other criteria of *alter ego* status, I find that Respondent Campbell was an *alter ego* of Respondent Campbell-Harris and that Respondent Campbell and Respondent Campbell-Harris constitute a single employer within the meaning of the Act.

In light of the above finding, I find that Respondent Campbell-Harris and Respondent Campbell were obligat-

ed to the Union as bargaining representative of their employees to abide by the terms of the collective-bargaining agreement⁶ entered into between NECA and the Union at a time when Respondent Campbell-Harris had assented to NECA as its collective-bargaining representative. By failing to do so, Respondent Campbell-Harris and Respondent Campbell violated Section 8(a)(1) and (5) of the Act.

B. The Alleged Unlawful Discharge

The complaint alleges that on or about June 30, 1979, Respondent Campbell-Harris terminated the employment of Coy McKee, Frank Maples, and Budgie L. Harris, because of their union membership. The record indicates that these individuals were terminated by Respondent Campbell-Harris when it ceased operations. In light of the fact that contemporaneously with the cessation of operations by Respondent Campbell-Harris, Respondent Campbell, herein found to be an *alter ego* of Respondent Campbell-Harris, commenced operations as an open shop, and in light of Campbell's admission that he felt that Respondent Campbell-Harris had been unsuccessful on its bids because of the union scale, a finding is warranted that Respondent Campbell-Harris ceased operations and terminated the employees named above in order to avoid its obligations under the union contract. I find that Respondent Campbell-Harris thereby violated Section 8(a)(1) and (3) of the Act.

Alternatively, a finding is warranted that Respondent Campbell violated Section 8(a)(1) and (3) of the Act when it failed to hire McKee, Maples, and Harris. The evidence is undisputed that McKee and Maples were offered employment by Respondent Campbell and they declined the offer because it was an open-shop basis. As Respondent Campbell was an *alter ego* of Respondent Campbell-Harris and obligated to honor the contract with the Union, Respondent Campbell constructively discharged McKee and Maples when it offered them employment on an open-shop basis. Harris did not testify, but the record establishes his termination by Respondent Campbell-Harris when it ceased operations, and the inference is warranted that he, like McKee and Maples, was not employed by Respondent Campbell because it undertook to operate on an open-shop basis and he thereby was constructively discharged. I so find.⁷

Respondents contend that McKee, Maples, and Harris were supervisors within the meaning of Section 2(11) of the Act and that a violation of Section 8(a)(1) and (3) is therefore not warranted. The contention lacks merit. Assuming, *arguendo*, that these individuals had been employed as foremen and supervisors within the meaning of the Act at times past, it is undisputed that at the time of their terminations none was working as foreman. According to McKee and Maples, they had not worked as

⁶ This agreement had been entered into on September 1, 1977, and was amended on September 1, 1978, and September 1, 1979, to continue in effect until August 31, 1980.

⁷ The complaint does not allege that Respondent Campbell violated Sec. 8(a)(1) and (3) of the Act in the termination of McKee, Maples, and Harris, but the matter was fully litigated.

⁵ It is also readily seen that Respondent Campbell-Harris was still in existence as of March 1980.

foremen at any time in 1979. Accordingly, I find they were employees at the time of their termination.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in section II, above, occurring in connection with their operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Campbell-Harris terminated Coy McKee, Frank Maples, and Budgie L. Harris on or about June 30, 1979, in order to avoid its contractual obligations with the Union and that Respondent Campbell offered them employment on discriminatory terms, I shall recommend that they be required to offer such employees immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing if necessary any employees hired by either Respondent Campbell-Harris or Respondent Campbell in the interim, and make them whole for any loss of pay, including fringe benefits, they may have suffered by reason of the discrimination against them. The backpay provided herein shall be computed with interest, in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 117 (1977).⁸

Having found that Respondent Campbell-Harris and Respondent Campbell constitute a single employer and that Respondent Campbell has continued to operate as the *alter ego* of Respondent Campbell-Harris, but has failed and refused to recognize the Union as the collective-bargaining representative of its employees or to apply the terms of the collective-bargaining agreement between the Union and Respondent Campbell-Harris, to those employees, I shall recommend that Respondent Campbell-Harris and Respondent Campbell be required, upon request, to recognize the Union as the representative of its employees and to honor and apply the terms of that agreement to all of their employees working within the territorial jurisdiction of the Union. I shall recommend further that Respondents make whole all of their employees performing electrical work within the territorial jurisdiction of the Union by payment to them of any wage and other benefit losses they may have suffered by reason of the failure to honor the collective-bargaining agreement and to apply its terms to them, with interest in the manner described above.

⁸ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

I shall recommend further that Respondents make such employees whole by transmitting contributions owed to the various funds as provided in the collective-bargaining agreement, and in accordance with *Merryweather Optical Company*, 240 NLRB 1213 (1979).

CONCLUSIONS OF LAW

1. Campbell-Harris Electric, Inc., and Campbell Electric, Inc., constitute a single employer and are *alter egos* of the same business entity and, at all times material herein, have been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 700, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of employer-members of the Fort Smith Division, Arkansas Chapter of National Electrical Contractors Association, Inc., including employees of Campbell-Harris Electric, Inc., and Campbell Electric, Inc., performing electrical work within the territorial jurisdiction of the Union constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.⁹

4. The Union has been at all times material herein the exclusive representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing to recognize and bargain with the Union as the exclusive representative of the employees on the Campbell payroll in the above-described unit, by failing to honor the collective-bargaining agreement with respect to such employees, and by failing to apply to such employees the terms and conditions of the agreement, Respondents have violated Section 8(a)(5) and (1) and 2(6) and (7) of the Act.

6. By discharging or constructively discharging Coy McKee, Frank Maples, and Budgie L. Harris, in order to avoid its obligations under the contract and by offering them employment on an open-shop basis, Respondents have violated Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

⁹ As noted earlier, at the time of the unfair labor practices herein found, Respondent Campbell-Harris was a member of NECA and bound by the terms of the collective-bargaining agreement negotiated by NECA with the Union. Accordingly, the above-described unit is found appropriate. However, the record indicates that on March 24, 1980, Respondent Campbell-Harris, in effect, withdrew from NECA and revoked its authorization to be bound by joint negotiations. On the same date, Respondent Campbell-Harris gave the Union notice of its intent to terminate the existing contract and submitted proposed modifications. It does not appear that any negotiations ensued, apparently because of the matters pending herein. As the validity of the withdrawal from NECA has not been litigated herein, the unit found appropriate is that described above, without prejudice, however, to Respondent to assert, if necessity arises, that the appropriate unit since the withdrawal from NECA and the expiration of the most recent contract to which Respondent Campbell-Harris and Respondent Campbell were bound is a unit of all employees employed by Respondent Campbell-Harris and Respondent Campbell performing electrical work within the territorial jurisdiction of the Union.

ORDER¹⁰

The Respondents, Campbell-Harris Electric, Inc., and Campbell Electric, Inc., Fayetteville, Arkansas, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit, described above, with respect to wages, hours, working conditions or other terms and conditions of employment of said employees, and refusing to honor the collective-bargaining agreement between NECA and the Union.

(b) Discharging or constructively discharging employees in order to avoid its obligations under the contract with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Coy McKee, Frank Maples, and Budgie L. Harris immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Make whole all employees in the unit herein found appropriate for any wage and benefit losses they may have suffered by reason of the failure to honor the contract and apply its terms to them, with interest in the manner previously described.

(c) Make whole the employees in the appropriate unit by transmitting the contributions owed to the Union's health and welfare, annuity, pension, and joint apprenticeship training funds, pursuant to the terms of its collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any

other expenses ensuing from Respondent's unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, annuity, pension, and joint apprenticeship training funds after Respondent unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of Respondent's required contributions to such funds; and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered. All payments to employees shall be made with interest.

(d) Reimburse the Union for losses due to Respondent's failure to honor the dues-deduction authorizations of its employees in the appropriate unit.

(e) Upon request, recognize and bargain with the Union with respect to employees in the unit herein found appropriate and who constitute an appropriate bargaining unit under the Act.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(g) Post at its offices copies of the attached notice marked "Appendix."¹¹ Copies of said notice on forms provided by the Regional Director for Region 26, after being duly signed by Respondents' authorized representative, shall be posted by it immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."